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WM. R. STAN

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 265

TRANSPORTES MARITIMOS DO ESTADO,
Plaintiff-in-Error,

against

SYLVIO A. ALMEIDA,
Defendant-in-Error.

BRIEF FOR THE PLAINTIFF-IN-ERROR.

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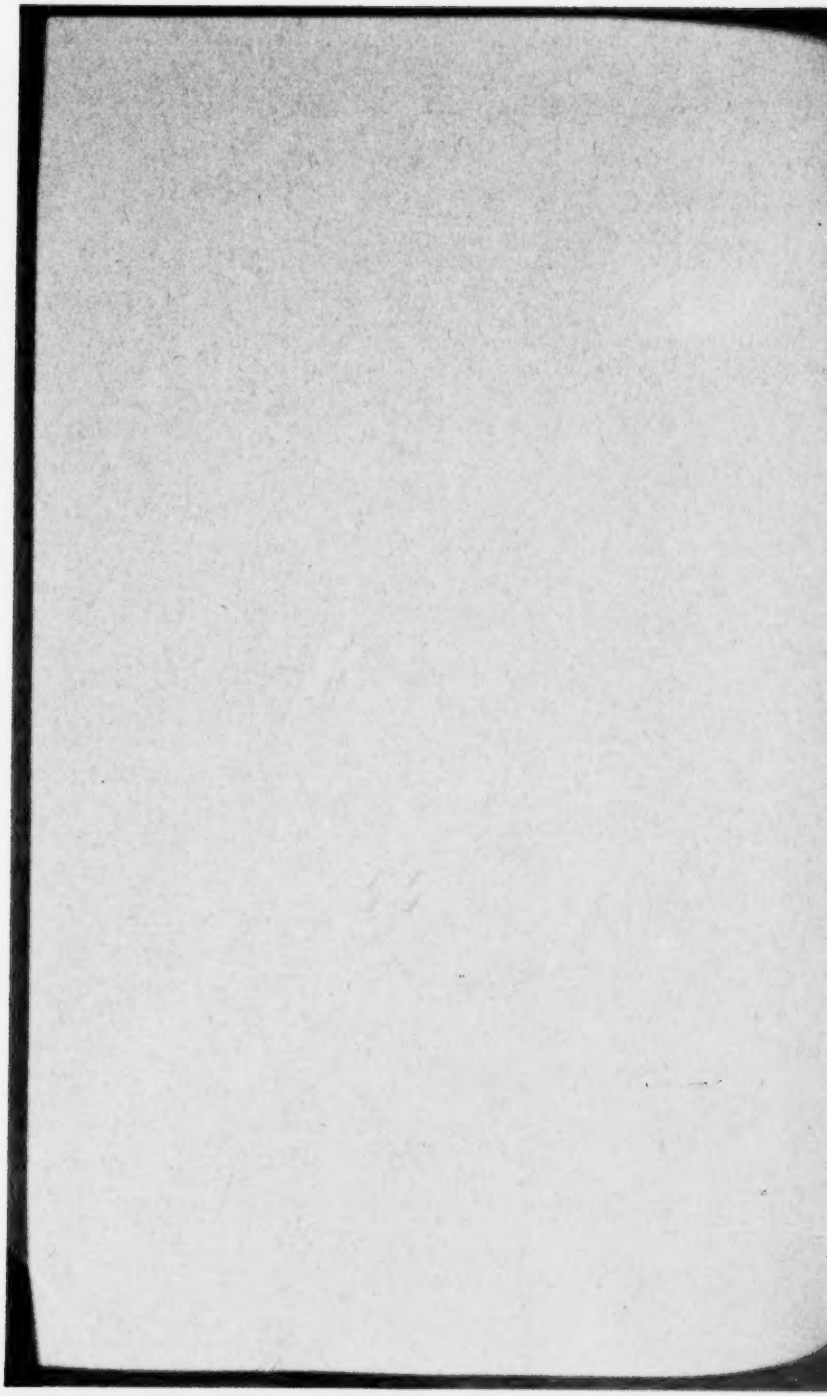

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Supreme Court of the United States

TRANSPORTES MARITIMOS DO ESTADO, Plaintiff-in-Error,		
AGAINST		No. 265.
SYLVIO A. ALMEIDA, Defendant-in-Error.		

Statement.

This is an action brought by the plaintiff below, a Brazilian sailor on the vessels of the Transportes Maritimos do Estado to collect a balance of wages for services rendered to said Transportes Maritimos do Estado, a department and integral part of the Sovereign Government of Portugal, between the 28th day of January, 1920, when he shipped on the Steamship *Goa* at New York for a voyage to Portugal and return on the 28th day of July, 1920, when he arrived again at New York on the Steamship *Cunene*. The contract was for work, labor and services as a sailor during said period, on the steamships owned and operated by the Transportes Maritimos do Estado. It was a contract made by an alien with an alien foreign sovereign government wholly to be performed on the ships of that government.

The plaintiff below signed Articles on January 28th, 1920, before the Acting Consul General of

Portugal in New York City to ship as a seaman on the Steamship *Goa*, for $75 a month and board. He received his wages on arrival of the *Goa* in Portugal and in addition an allowance for maintenance for a period of about two months in Portugal. At the end of this period he returned to New York on the Steamship *Cunene*, which was also owned and operated by the defendant, below. On arrival in New York the plaintiff below demanded payment of the balance of his wages from the Acting Consul General of the defendant government below. It was offered to him at the then rate of Exchange of Portuguese money and refused and he then brought this suit for $485, the amount named in the complaint.

The Summons and Complaint were served on the 28th day of September, 1920. The defendant below appeared generally and on the 19th day of November, 1920, an answer verified by the Acting Consul General of Portugal, was served, wherein it set up the defense of its sovereignty and objected to the jurisdiction of the Court on the ground of immunity from such jurisdiction because it was a part and a department of the foreign Sovereign Government of the Republic of Portugal, at peace with the United States and allied with the United States in the World War, and that to sustain a suit against it would be contrary to international comity and the treaty between Portugal and the United States, and also objected to such jurisdiction over the person and property of the defendant below without its consent.

Thereafter and on or about the 10th day of March, 1923, the defendant by its Minister Pleni-

potentiary and Envoy Extraordinary, duly accredited to this government filed in the office of the Clerk of the United States District Court for the Southern District of New York, a suggestion setting forth the sovereignty of the defendant below, and its immunity from the jurisdiction of that Court on the ground of said sovereignty.

The issue as to the sovereignty of the said defendant was referred to a Special Commissioner. In his report he failed to decide this question, but instead left it to the Court to decide. Upon the trial the only question being that of jurisdiction, both sides agreed to lay the case before a jury of one, and at the close of the trial Judge Henry W. Goddard, directed a verdict in favor of the plaintiff below for $435 (Record, p. 209). Judgment was entered accordingly (Record, p. 210) and from this judgment appeal was taken in due form directly to this Court by the defendant below upon this question of jurisdiction, which is the only issue on this appeal, and duly certified to this Court for determination (Record, pp. 211, 212, 213).

POINT I.

The defendant below is a sovereign and owned and operated the vessels mentioned in this suit for public sovereign purposes.

1. In a similar case brought by the attorney for the plaintiff below in the instant case, a commission was issued by order of the United States District Court for the Southern District of New York to take testimony of officials of the Government of Portugal in order to support the

affirmative defenses of the defendant below that it is a department of said government and not a private corporation as is alleged in the complaint. This commission was issued and a return made and the commission and the return with exhibits, have been printed and bound and have been accepted in evidence as this defendant-appellant's 'Exhibit A," on consent of counsel for both sides in this case.

That the Transportes Maritimos do Estado is actually a part of the sovereign government of Portugal and therefore itself sovereign, that its steamships are owned, operated and manned directly by said government, and were used as transportes of said government and on government business and carried government goods and supplies, is amply adduced upon the evidence obtained by the commission and accepted herein as said defendant-appellant's "Exhibit A," contained in pages 24 to 29, 82 to 92, and 152 to 156, all inclusive and in the suggestion of the Minister accepted in evidence as defendant-appellant's "Exhibit B."

In answer to the direct interrogatories Alvaro A. N. Ribeiro, the Director General of the defendant below testifies as follows:

> Third question (p. 18, Record, p. 40), "What, if any, office do you hold under the Portuguese Government?" Answer, (p. 24, Record, p. 46), "Director of Transportes Maritimos do Estado under the Portuguese Government." Seventh question, (p. 19, Record, p. 40) "Is Transportes Maritimos do Estado a department of the Government of Portugal? If so affix certified copies of all documents showing this fact." Answer, (p. 25, Record, p. 47) "Yes, it is a depart-

ment of the Government of Portugal." Text of government decree No. 5564 annexed, Enclosure "A" (Record, pp. 47 and 104). Eighth question, (p. 19, Record, p. 41) "When was Transportes Maritimos do Estado created? If by public decree affix copy of same." Answer, (p. 25, Record, p. 47), "On February 24, 1916." Text of Government Decree No. 2236 Annexed, Enclosure "B" (Record, p. 174).

Ninth question (p. 19, Record, p. 41), "By whom is Transportes Maritimos do Estado controlled?" Answer, (p. 26, Record, p. 48), "Directly by Minister of Commerce of Portugal." Sixth cross-question, (p. 22, Record, p. 44), "Are the shares of stock of the respondent herein sold, traded or assigned, and what is their par value and what is their present market value?" Answer, (p. 28, Record, p. 50), "There are no shares of stock." Seventh cross-question, (p. 22, Record, p. 44), "How many stockholders are there if you know, and how many directors and officers are there, and their names and positions?" Answer, (p. 29, Record, p. 51), There are no stockholders. I am the only director and there are no other officers."

That the vessels were owned, operated and manned directly by said Government, the Director General upon said commission testified as follows:

Sixth question (p. 18, Record, p. 40), "what is the Transportes Maritimos do Estado?" Answer, (p. 25, Record, p. 47), "It is intended for the operation of all steamers seized from several German companies during the war, and considered as good prize of war by the Naval Court."

Twelfth question, (p. 19, Record, p. 41), "When and under what circumstances were the ships acquired?" Answer, (p. 26, Rec-

ord, p. 48), "They were German steamers interned in Portugal ports during the war and were requisitioned under terms of Decree No. 2236 of February 24, 1916."

Nineteenth question (p. 19, Record, p. 41), "What provision is made by the Government of Portugal for the presentation and determination of sailors' claims for wages? Answer fully and affix copies of any documents supporting the answer." Answer, (p. 27, Record, p. 49), "The Portuguese Naval authorities in all Portuguese harbors determine and pay what wages are due."

Twentieth question (p. 20, Record, p. 42), "Are the ships operated primarily for the use and benefit of the Government?" Answer, (p. 27, Record, p. 49), "Yes."

The Minister of the Republic of Portugal states in his suggestion (Defendant's Exhibit B, Record, p. 206):

> "That the Republic of Portugal * * * is and was * * * the sole owner of the Steamship *Goa*."

And that the vessels were used for government business the Director General upon the aforesaid commission testified as follows:

> Twentieth question, (p. 20, Record, p. 20), "Are the ships operated primarily for the use and benefit of the government?" Answer, (p. 27, Record, p. 49), "Yes."

The steamship *Goa* was one of the German steamships included in the list in the Record on pages 174 and 175, which were the German ships interned in Portuguese ports as above testified by the Director General.

The Suggestion of the Minister of the defendant below also stated that the Republic of Por-

tugal appeared before this Honorable Court for the purpose of asserting its ownership and claim to said vessel as her sole, true and *bona fide* owner, and affirms that no other sovereign, person or persons are the owners thereof (Defendants Exhibit "B," Record, p. 206, paragraph "Third") and that the said steamship was operated by the said government department as a maritime transport of the Republic of Portugal, and was employed in the transportation of and carriage of goods and supplies for the account and benefit of said government. That at said times said vessel was manned and officered by persons employed by said government. (Defendant's Exhibit "B," Record, p. 206, Paragraph "Second."

2. Thus it will be evident that the Transportes Maritimos do Estado is an integral part of the Sovereign Government of Portugal and therefore is itself sovereign just as the British Admiralty is an integral part of the government of the United Kingdom of Great Britain and Ireland as held in the *Adriatic*, 258 Fed. 902, and the steamship *Goa* was and is public sovereign property of said sovereign.

POINT II.

The Transportes Maritimos Do Estado being an integral part of the sovereign government of Portugal is immune from suits in the United States Courts and this immunity was not in any manner waived herein by the said sovereign.

I.—The sovereign character of the plaintiff-in-error we have we believe fully shown above in Point I. Being sovereign it was therefore immune from the jurisdiction of the United States

Courts, as it is well settled that a sovereign cannot be sued in the United States Courts without its consent. (*Beers* v. *Arkansas*, 20 How., 527; *The Siren*, 7 Wall., 152, 154; *The Maipo*, 259 Fed., 367). The immunity of a foreign or national sovereign is in no way analogous to that of a domestic sovereign such as a State of the United States and does not rest upon the same principles. While a sovereign voluntarily may submit to the jurisdiction of its own courts, neither the state nor the federal government does or should impose the jurisdiction of its courts upon a foreign sovereign, as by so doing it transgresses the dignity of the foreign sovereign. It is universally recognized by the comity of nations that a foreign sovereign and its property are immune from the jurisdiction of our courts (*The Exchange*, 7 Cranch., 116, 11 U. S., 116; *The Carlo Poma*, 259 Fed., 369; *Briggs* v. *The Light Ships*, 11 Allen, Mass., 157; *The Fidelity*, 9 Ben., 333; *The Maipo*, 252 Fed., 627; *The Roserie*, 254 Fed., 154; *Mason* v. *Intercolonial Ry.*, 197 Mass., 349; *The Davis*, 10 Wall., 15; *Long* v. *The Tampico*, 16 Fed., 491; *The Attualita*, 238 Fed., 909; *The Luigi*, 230 Fed., 493; *The Othello*, 5 Blatchford, 342; *The Florence H.*, 248 Fed., 1012; *Workman* v. *The Mayor of New York*, 179 U. S., 552).

The most recent opinions on this subject are the United States of America, owner of the Steamship *Western Maid* v. *The Hon. J. Whitaker Thompson*, 257 U. S., 419, and *Oliver American Trading Co.* v. *The United States of Mexico*, 70 N. Y. *Law Journal* No. 15 (U. S. Dist. Ct., So. Dist. of N. Y.) p. 209. Mr. Justice Holmes, in

delivering the opinion of the United States Supreme Court in *Kawananakoa* v. *Polyblank* (205 U. S. 349, 353) said:

> "Some doubts have been expressed as to the source of immunity of a sovereign power from suit without its permission, but the answer has been public property since before the days of Hobbes, (*Leviathan*, c. 26, 2). A sovereign is exempt from suit."

II.—This sovereign plaintiff-in-error, did not waive its objection to the jurisdiction of the District Court.

There was certainly no express waiver of such jurisdiction.

1. In this case the answer protested against the jurisdiction of the Court and set up distinctly the plea of immunity. A voluntary appearance and answer waives objection to jurisdiction only in cases where the Court would acquire jurisdiction of the person if the process had been properly executed within its jurisdiction. If, however, the person sued is immune from suit so that the Court could not so acquire jurisdiction of his person by such process as in this case, a general appearance and answer in which there is a protest against the exercise of jurisdiction and a plea of lack of jurisdiction does not waive this defense. The plea here is not alone to the jurisdiction of the person but to the subject-matter of the action. Although this action is apparently to recover sailors wages, of which subject matter the Court would ordinarily have jurisdiction, it is really for services rendered to a foreign sovereign, of which the Court cannot have jurisdiction without the consent of

the sovereign. In such a case an appearance and answer cannot confer jurisdiction, for it is well settled that the question of jurisdiction can be raised at any time by the parties or by the Court itself. (*DeSimone* v. *Transportes Maritimos do Estado*, 200 N. Y. App. Div., 82; *Bradbury* v. *Waukegan & W. Mining & Smelting Co.*, 113 Ill. App., 600; *Persons* v. *Standard Life & Accident Ins. Co.*, 92 Fed., 1022; *Chicago Union Traction Co.* v. *City of Chicago*, 70 N. E., 659; *Loomis* v. *Wadhams*, 74 Mass., 557; *Evansville Grain Co.* v. *Machler*, 88 Mo. App., 186; *Butterick* v. *Richardson*, 64 Pac., 390, 39 Ore., 246; *Lewisburg Bridge Co.* v. *Union Co.*, 323 Pa., 255; *Reid* v. *Reid*, 72 Misc. (N. Y.) 214; *Rigney* v. *Rigney*, 127 N. Y., 408; *Wheelock* v. *Lee*, 74 N. Y. 495; *State of Rhode Island* v. *State of Massachusetts*, 12 Peters, 657; *Carr* v. *United States*, 98 U. S., 432; *Dickerhoff* v. *Adler*, 12 Misc., 445; *Meyer* v. *American Locomotive Co.*, 201 N. Y., 163; *Landers* v. *Staten Island R. R. Co.*, 53 N. Y., 450.)

2. It is also perfectly proper to raise this question of jurisdiction by an answer to the libel, and a denial of the allegations in the answer or pleading other defenses does not affect the question or constitute a waiver. (*Rhode Island* v. *Massachusetts*, 12 Peters, 657; *Knight* v. *Bucer*, 6 Ohio Dec., 28; *Hulbert* v. *Palmer*, 39 Neb., 158; *Christian* v. *Williams*, 35 Mo. App., 297; *The Luigi*, 230 Fed., 493; *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed., 341; *Porto Rico* v. *Rosaly*, 227 U. S., 270; *Porto Rico* v. *Ramos*, 232 U. S., 627.)

In *Rhode Island* v. *Massachusetts*, 12 Peters, 657, the Court said at page 720:

> "When the objection goes to the power of the Court over the parties or the subject-matter, the defendant need not, for he cannot give the plaintiff a better writ or bill. Where no inferior court can have jurisdiction of a case in law or equity the ground of the objection is not taken by plea in abatement as an exception of the given case from the otherwise general jurisdiction of the Court; appearance does not cure the defect of judicial power and it may be relied on by plea, answer, demurrer or at the trial or hearing unless it goes to the manner of bringing the defendant into court."

Therefore, this appellant could properly rely upon its answer and the defense of immunity and objection to jurisdiction which they contained. In fact, it is a universally recognized principle that a foreign sovereign is entirely and completely immune from the process or jurisdiction of our courts. This includes judgments as well as other processes. It follows, therefore, that this objection can be first raised at any time including upon the appeal before this court.

3. The filing of a bond and stipulation moreover, cannot be regarded as a waiver of objection to jurisdiction. The filing of a claim of owner and stipulation in this case certainly would have no more effect as a waiver than a filing of an appearance or answer. No officer or agent of the sovereign can by any act waive sovereign immunity to suit without the specific legislative authority of the sovereign, accompanied by its express consent to submit to the jurisdiction of

the Court, and as this authority and consent were wholly lacking in this case, the filing of a claim and stipulation could not operate as a waiver. In *The United States of America, owner of the Steamship Western Maid, petitioner*, 257 U. S., 419, decided in the United States Supreme Court, January 3, 1922 the United States, by its attorney, duly made claim for said steamship in the District Court and caused to be filed of record a stipulation executed by the United States Shipping Board Emergency Fleet Corporation, for the payment of any award made under the final decree of the Court in said proceedings and this Court subsequently made absolute a writ of prohibition to prevent the District Court from exercising jurisdiction.

The case of *The Luigi* (230 Fed., 493) which has been cited in support of this theory of waiver, does not at all support this contention. In that case the vessel was a privately owned vessel, held under requisition or charter by the sovereign, and *the private owner* filed a claim of owner and bond. The Court allowed the attachment to stand not on the ground of waiver of objection to jurisdiction by the sovereign, but only on the ground that the private owner had intervened and that therefore the rights of the sovereign could no longer be affected.

In the very recent case in the United States District Court for the Southern District of New York, *The Oliver American Trading Co., Inc.*, v. *The Government of the United States of Mexico*, decided October 11, 1923, (New York *Law Journal*, Vol. 70, No. 15, page 209), where there was a general appearance of the defendant, the Court sustaining the sovereign immunity of the

Republic of Mexico upon a motion to dismiss on the ground of that immunity, said:

> "The only remaining obstacle in granting the relief asked by the defendants is the contention that jurisdiction has been acquired through a general appearance herein upon the part of their attorneys. Without detailing the reservations made by such attorneys * * * their clear intendment, when fairly construed, is that the appearance was special and designed to raise the question of immunity presented by their motions. Even upon the questions of appearance the court is more concerned with substance than with form." (Italics ours.)

So in this case in appearing and answering, it is certainly shown by its answer that the clear intendment of the proctors for this appellant was to raise this question of its immunity from the jurisdicton of these courts.

The Portuguese government objected to the jurisdiction of the court in its answer, and not only did not at any time in any way waive its objection, but repeatedly reiterated that objection, and in fact filed a suggestion in proper form by its minister accompanied by a certification by the Secretary of State of the United States, that he was the duly accredited diplomatic representative of this government, as in *The Ragday* (279 Fed. 130). This suggestion emphatically repudiated any waiver of objection to jurisdiction by the Portuguese Government and directly averred that the appearance and bond given by its consul or counsel or any other person on its behalf in this action was unauthorized. It also expressly stated that no authorized consent to submit to the jurisdiction of the courts

of the United States had been given by his government and, as it had the right to do under *Beers* v. *Arkansas* (20 How. 527) expressly withdrew any consent which might be inferred to have been implied.

There have in fact been no decisions which have held that by appearing and answering in an action in which an effort was made to bring a sovereign into court orginally as a party, the sovereign waived its immunity. The law has been consistently against such a theory of waiver by a sovereign (*Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed., 341; *The Luigi*, 230 Fed., 493; *Porto Rico* v. *Ramos*, 232 U. S., 627; *Porto Rico* v. *Rosaly*, 227 U. S., 270; *Kawananakoa* v. *Polyblank*, 205 U. S., 349; *Smith* v. *Reeves*, 178 U. S., 436; *Richardson* v. *Fajardo Sugar Co.*, 241 U. S., 44; *Gunter* v. *Atlantic Coast Line R. R. Co.*, 200 U. S., 273; *Clark* v. *Barnard*, 108 U. S., 436). In the *Kingdom of Roumania* v. *Guaranty Trust Co.* (*supra*), it was held that even by directly invoking the jurisdiction of the Court, the sovereign did not waive its immunity to the extent of subjecting itself to an affirmative judgment. The Court there said:

> "It is the long accepted law that a foreign sovereign cannot be sued nor his property attached in the courts of a foreign friendly country without its consent. Nor can the defendant when sued by a foreign sovereign avail himself of any counterclaim or set-off arising out of the same transaction. Under no circumstances can he obtain an affirmative judgment."

If this be the law it surely cannot be successfully claimed that by pleading to a complaint

against it and directly asserting and claiming its immunity therein the sovereign waived its immunity, and "it is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission" (*Beers* v. *Arkansas*, 20 How., 527). In *Smith* v. *Reeves*, 178 U. S. 436, Justice Harlen said:

> "The suability of a state without its consent is a thing unknown to the law. This has been so often laid down and acknowledged by courts that it is hardly necessary to be formally asserted. It may be accepted as a point of departure unquestioned."

III—There can be no implied waiver by a sovereign.

1. The sovereign's submission to the jurisdiction of our courts must be by its own express consent, by the act of its Legislature or by an equivalent sovereign act of the government itself. (*Carr* v. *United States*, 98 U. S., 432; *People of the State of New York* v. *Dennison*, 84 N. Y., 272; *Valarino* v. *Thompson*, 7 N. Y., 576; *Hassard* v. *Mexico*, 46 A. D. 623; 29 Misc., 511; *United States* v. *Eckford's Exrs.*, 6 Wall 484; *The Exchange*, 7 Cranch., 116, 117; *The Siren*, 7 Wall., 152, 154; *Stanley* v. *Schwalby*, 147 U. S., 508; *Republic of France* v. *Pittsburg Steel Export Co., etc.*, 112 Misc., (N. Y.) 688; *Dollar Savings Bank* v. *United States*, 19 Wall., 227, 239). It must be conceded from the answer that this consent is lacking in this case, that there was no such sovereign act of consent, and there is in this case no evidence of any such consent.

The case of *United States* v. *New York and Oriental S. S. Co., Limited* (216 Fed. 61, 63),

holds that the sovereign, in this case the United States, cannot be sued without its consent and that its consent to be sued must be evidenced by an Act of Congress, and cites *Stanley* v. *Schwalby* (162 U. S. 255), and further it holds that government officers cannot waive the government's privilege in this respect and that their consent that such a suit should be brought cannot bind the Government of the United States (*Carr* v. *United States* 98 U. S., 432).

2. There can be no estoppel of a sovereign to set up its immunity or objection to the jurisdiction of our courts not only for the reasons above stated, but also because even whenever the sovereign does consent to submit to jurisdiction it is its right inherent in its sovereignty to withdraw its consent. (*Valarino* v. *Thompson*, 7 N. Y., 576; *United States* v. *Lee*, 106 U. S., 196; *Stanley* v. *Schwalby*, 147 U. S., 508; *DeSimone* v. *Transportes Maritimos do Estado*, *supra*, *Beers* v. *Arkansas*, 61 U. S., 527; *South & North America Alabama R. R. Co.* v. *Alabama*, 101 U. S., 832.)

3. The District Court assumed jurisdiction apparently upon the theory that by appearing and answering the libel in this case the claimant had waived its objection to the jurisdiction of the court. This theory is untenable.

In the *Western Maid*, 257 U. S., 419, there was a general appearance by the government and nevertheless the writ of prohibition was made absolute.

POINT III.

The question of the jurisdiction of the Court upon the ground of sovereignty can be raised at any time.

1. In an action such as this to recover for services rendered to a foreign sovereign in its own ships, the court cannot have jurisdiction without the consent of the sovereign and an appearance and answer cannot confer jurisdiction, for in such cases it is well settled that the question of jurisdiction can be raised at any time by the parties or the court itself. (*De Simone* v. *Transportes Maritimos do Estado*, 200 N. Y. App. Div., 82, February, 1922 (Appendix B, *infra*, page 33), *Bradbury* v. *Waukegan & W. Mining & Smelting Co.*, 113 Ill. App., 600; *Persons* v. *Standard Life & Accident Ins. Co.*, 92 Fed., 1022; *Chicago Union Traction Co.* v. *City of Chicago*, 70 N. E., 659; *Loomis* v. *Wadhams*, 74 Mass., 557; *Evansville Grain Co.* v. *Machler*, 88 Mo. App., 186; *Butterick* v. *Richardson*, 64 Pac. 390, 39 Ore., 246; *Lewisburg Bridge Co.* v. *Union Co.*, 232 Pa., 255; *Reid* v. *Reid*, 72 Misc. (N. Y.) 214; *Rigney* v. *Rigney*, 127 N. Y, 408; *Wheelock* v. *Lee*, 74 N. Y., 495; *State of Rhode Island* v. *State of Massachusetts*, 12 Peters, 657; *Carr* v. *United States*, 98 U. S., 432; *Dickerhoff* v. *Adler*, 12 Misc., 445; *Meyer* v. *American Locomotive Co.*, 201 N. Y., 163; *Landers* v. *Staten Island R. R. Co.*, 53 N. Y. 450.)

2. It has, in fact, been held that if the Courts of the United States should exercise such jurisdiction without the consent of the foreign sov-

ereign it would amount to a declaration of war. (*The Exchange*, 11 U. S., 116; *The Maipo*, 259 Fed., 367, 368; *The Luigi*, 230 Fed., 493, 496; *The Constitution*, 4 P. D., 39, 4 Aspin, 79; *The Parlement Belge*, 5 P. D., 197, 4 Aspin., 234.) In England this doctrine of the complete immunity of a foreign sovereign and its vessels, and other property and funds has been uniformly upheld. (*The Parlement Belge*, L. R., 5 P. D., 197; *The Constitution*, Lr. R., 4 P. D., 39; *The Prins Frederick*, 2 Dod., 451; *The Jassy* (1906), P., 270; *The Gagara* (1919), P., 95; *The Scotia* (1903), A. C., 501; *The Porto Alexandre* (1920), P., 30; *The Broadmayne* (1916), P., 64; *The Messicano*, 32 Times L. R., 519; *The Crimdon*, 35 Times Law R. 81; *The Eolo* (1918), Ir., 78; *Varasseur v. Krupp*, L. R., 9 Ch. D., 351; *DeHaber v. Queen of Portugal*, 17 Ad. & El. (N. S.), 171, 202; *Wadsworth v. Queen of Spain*, 17 Ad. & El. (N. S.), 171. 215.) Rights or claims such as alleged in the cases at bar are not the subject of jurisdiction of our courts but should be adjusted by negotiations through diplomatic channels between the governments concerned. They are "*not justiciable but diplomatic.*" (*The Carlo Poma*, 259 Fed., 369; *The Maipo*, 252 Fed., 627; 259 Fed., 367; *The Parlement Belge*, L. R. 5 P. D., 197; *The Porto Alexandre* (1920), P., 30.)

3. Since the defendant below is a foreign sovereign the Court can take judicial notice of these facts of its sovereignty and the lack of jurisdiction of our Courts over it, without the filing of a suggestion by the sovereign, and of its own motion, this Court can refuse to entertain or per-

mit jurisdiction over this sovereign or its property. (*Mansfield, etc., R. Co.* v. *Swan*, 111 U. S., 379, 382; *King Iron Bridge, Etc., Co.* v. *Otoe County*, 120 U. S., 225; *Cameron* v. *Hodges*, 127 U. S. 322, 326; *Metcalf* v. *Watertown*, 128 U. S., 586, 587; *Continental National Bank* v. *Buford*, 191 U. S., 129; *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S., 449, 453; *Louisville, etc., R. Co.* v. *Motley*, 211 U. S., 149; *Caperon* v. *Van Norden*, 2 Cranch, 126; *Jackson* v. *Ashton*, 8 Peters, 148; *Dred Scott Case*, 19 How., 398, 400; *Bors* v. *Preston*, 111 U. S., 252; *Williams* v. *Nottawe*, 104 U. S., 209; *United States* v. *Huckabee*, 16 Wall 414.)

The case of *De Simone* v. *Transportes Maritimos do Estado*, 200 N. Y. App. Div. 82, as it contains a very able and carefully considered discussion of the facts in this case is printed at the end of this brief as Annex A.

POINT IV.

The proper method to raise this question of jurisdiction is by a suggestion of the minister of the sovereign such as has been filed herein.

1. The suggestion to an admiralty Court that the person sought to be sued is a foreign government or the property sought to be attached is the property of a foreign government, may properly be made by a duly accredited minister or representative of the foreign government at any time. (*The Maipo*, 252 Fed., 627; *The Adriatic*, 258 Fed., 902; *The Ragday*, 279 Fed. 130; *The Roseric*, 254 Fed., 154.)

(a) In *The Maipo, supra*, the Court said:

> "While, in many instances, the suggestion that a ship is the property and in the possession of a foreign government would be made to the Court by the appropriate official or department or our government, I fail to find any support for the proposition that such course is necessary. *In re Baiz*, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. *It is enough that the fact is presented to the Court, as here, by the duly accredited official of the foreign government.*"

(b) In *The Adriatic, supra* (E. D. Pa.), Haight, *J.*, said very decidedly in point with the case at bar:

> "H. Baars Co., a corporation of Delaware, filed in the court below a libel *in rem* against the British Steamship *Adriatic*, and a libel *in personam* against the owners, W. H. Corkerline & Co., a British concern, to recover damages which it claimed to have sustained by reason of an alleged breach of a charter party that had been entered into, on September 28, 1916, between the owners of the steamship and the Export Terminal & Shipping Company and which had been assigned to the latter by the libellants prior to the alleged breach. * * * On November 8, 1915, while the vessel was on the high seas, the Transport Division of the British Admiralty notified the owners in England, by telegram, which was confirmed by letter sent to them the following day, that the ship had been requisitioned for government service. Instructions * * * were also cabled to the British Consul General at Philadelphia. Before the case came on for trial, but *long after the vessel had been released from arrest under bond given by the owners*, a suggestion was filed by Counsel for the British Embassy,

appearing as *amici curiæ*, to the effect * * * that the steamship, * * * had been 'duly requisitioned by the British Admiralty, which is an integral part of the Government of the United Kingdom of Great Britain and Ireland,' and that the requisition was a 'governmental action by the government of Great Britain, and should not be inquired into by, the court in which the case was pending,' * * * The learned judge of the Court below, feeling that under the circumstances he should decline to adjudicate any claim of right advanced by the libellants' which grew out of the requisitioning of the vessel by the British government, dismissed the libels. Thereupon the libellants appealed. In addition to the beforementioned suggestion filed in the Court below, there has been filed in this Court, under the hand of the British Ambassador and the seal of the British Embassy, a certificate wherein are set forth the same facts as were set forth in the suggestion, and an express avowal again made that the requisition of the steamship was a 'governmental act by the government of Great Britain and Ireland.' On principles of international comity, we feel bound to accept the suggestion and avowal of the British Ambassador *as conclusively establishing both the fact of the requisition and its governmental character.* Such has been the practice, as to similar facts, of the English courts. (*The Parlement Belge*, L. R. 5 P. D. 197; *The Constitution*, L. R. 4 P. D. 39), and quite generally of the Courts of this country. See *The Maipo* (D. C. S. D. N. Y.) 252 Fed. 627; *Agency of Can. Car & F. Co.* v. *American Can Co.* (D. C. S. D. N. Y.) 253 Fed. 152; *The Roseric* (D. C. N. J.) 254 Fed. 154, *where the suggesstions were made directly by counsel for an embassy* * * * In accordance with the rule that 'the courts of one

independent government will not sit in judgment on the validity of the acts of another done within its own territory, it is not within the province of a court of this country to attempt to determine whether the requisition of the vessel was valid or invalid under the laws of Great Britain. It must be here accepted as legal, or, as it is sometimes expressed, such a question is not justiciable. *Ricaud* v. *American Metal Co.*, 246 U. S. 304, 309, 38 Sup. Ct. 312, 62 L. Ed. 733; *Underhill* v. *Hernandez*, 168 U. S. 250, 253, 18 Sup. Ct. 83, 42 L. Ed. 456; *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 357, 29 Sup. Ct. 511, 53 L. Ed. 826, 16 Am. Cas. 1047; *Oetjen* v. *Central Leather Co.*, 245 U. S. 297, 303, 38 Sup. Ct. 309, 62 L. Ed. 726; *The Invincible*, 2 Call. 29 Fed. Cas. No. 7,054; *Hewitt* v. *Speyer*, 250 Fed. 367, 162 C. C. A. 437 (C. C. A. 2nd Cr.); *Earn Line S. S. Co.* v. *Sutherland S. S. Co.* (D. C. S. D. N. Y.) 254 Fed. 126. Hence it follows that, * * * no cause of action accrued to them from the failure of the vessel to perform the charter, *so far as the courts of this country are at liberty to determine.* This conclusion has rendered it unnecessary for us to consider or decide any of the other questions which have been raised."

(c) In *The Ragday*, *supra*, the Court said:

"This is an application to release from seizure and attachment in admiralty the above named vessel interposed by and in behalf of the Russian government, through its consular office at the port of San Francisco, by a suggestion, in proper form, setting forth that the attached vessel was at the time of seizure the property of the Russian government *and engaged in its public service*, and that such seizure and detention is an interference with and detrimental to that service.

The application is accompanied by the *certificate of the Secretary of State, certifying to the existing recognition by the President and the State Department of Mr. Boris Bakhmetoff as the duly accredited diplomatic representative of Russia* to the United States at Washington, and a certificate from the latter that Mr. George Romanovsky the party presenting the suggestion, is entitled to recognition as the acting Russian Consul at San Francisco and authorized to represent the Russian Government in the matter pending before the Court. These facts bring the case fully within the principles of *The Roseric* (D. C.) 254 Fed. 154, and the cases therein cited; and under the principles there announced, and in the later case of *The Adriatic*, 258 Fed. 902, 169 C. C. A. 662, the Court is not at liberty to ignore the suggestion of the Russian government, for the release of the vessel."

2. It will be noted that the suggestion of the Minister of Portugal in this case bears the proper certification by the Secretary of State of the United States.

3. The suggestion could not have been presented to the court in this case by an official of the American Government as is stated to be the proper practice in the cases of *Ex Parte Muir*, 254 U. S. 522; *The Pesaro*, 255 U. S. 216; *Ex Parte Hussein Lutfi Bey*, 256 U. S. 616; for the very practical reason that the American State Department refuses to accept such suggestions from foreign diplomatic officers in litigation involving merchant vessels, assuming we think not quite properly to determine itself whether the

vessel is or is not a merchant vessel and whether or not the foreign government is entitled to immunity. This question is one for the Court and not for the State Department.

(*Author's Note*)—Suggestions were presented to the State Department in this and other cases by the Minister of Portugal in person and refused by the Department with the same statement that the practice of accepting suggestions of this nature had been entirely discontinued.

Thereafter the undersigned went to the State Department and explained to the attorneys in charge, the rulings of this court in said cases and requested the States Department to follow this practice and accept the suggestion from the Minister but the request was again refused with the explanation that the State Department does not follow this practice.

The practice, then, as laid down by this Honorable Court in the said cases is impossible of performance, and if this ruling is to stand, it makes it impossible for a friendly sovereign power to ask or obtain immunity from the jurisdiction of the American courts in any case, and by comity or retaliation no immunity for American Government vessels or property from jurisdiction from courts of friendly foreign governments.

POINT V.

This Court is without jurisdiction of the Cause of Action herein.

I.—That the Court is without jurisdiction herein because of the sovereignty of the plaintiff-in-error and that its immunity can be raised at any time we believe we have sufficiently shown in Point II, *supra.*

In *Foster on Federal Practice*, Sixth Edition, Section 94, the author discussing who may be sued in the Courts of the United States, also says:

> "All persons may be made defendants, except the United States, without their consent, or a territory thereof; *foreign states* and sovereigns for acts done in a political capacity," and cites *Duke of Brunswick* v. *King of Hanover*, 6 Beav., and *Hullet* v. *King of Spain*, 2 Bligh, N. R. 30.

Further this same author says in Section 102a.

> "A District Court of the United States has no jurisdiction *in personam* against a foreign state or sovereign," citing *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341.

II.—This Court is without jurisdiction as the action is brought by an alien against a foreign government or it is an action between aliens.

1. If the court finds that this defendant below is a sovereign then the courts of the United States should not entertain jurisdiction over a foreign sovereign without its consent and the complaint should be dismissed.

2. If on the other hand the defendant below were merely a Portuguese corporation it is an action between aliens, and there is no reason why admiralty should retain jurisdiction of this case between aliens, and a Federal Court of law has no jurisdiction of a suit between aliens where no federal question is involved. (*The Cunard S. S. Co.* v. *Smith*, 255 Fed. 846; *The Kaiser Wilhelm III*, 230 Fed. 717; *The Carolina*, 14 Fed. 424; *Goldman* v. *Furness Withy & Co.*, 101 Fed. 467; *Montalet* v. *Murray* (1807) 4 Cranch 46, 2 U. S. L. Ed. 545; *Hodgson* v. *Bowerbank*, (1809) 5 Cranch 303, 3 U. S. L. Ed. 108; *Jackson* v. *Twentyman* (1829) 2 Pet. 136, 7 U. S. (L. Ed.) 374; *Prentiss* v. *Brennan* (1851) 2 Blatchf. 162, 19 Fed. Cas. No. 11,385; *Rateau* v. *Bernard* (1854) 3 Blatchf. 244, 20 Fed. Cas. No. 11,579; *Hinckley* v. *Byrne* (1867) Deady 224, 12 Fed. Cas. No. 6,510; *Lacroix* v. *Lyons* (E. D. La. 1886), 27 Fed. 403; *Johnson* v. *Accident Ins. Co. of North America* (W. D. Mich. 1888) 35 Fed. 374; *Laird* v. *Indemnity Mut. Marine Assur. Co.* (S. D. N. Y. 1890) 44 Fed. 712; *Pooley* v. *Luco* (S. D. Cal. 1896) 72 Fed. 561; *Gage* v. *Riverside Trust Co.* (S. D. Cal. 1906) 156 Fed. 1002; *Petrocokino* v. *Stuart* (1879) 14 Phila. (Pa.) 412, 37 Leg Int. (Pa.) 30, 19 Fed. Cas. No. 11,041.)

In *Cunard S. S. Co.* v. *Smith, supra*, where it was held that the Federal Courts, whose jurisdiction is derived from the Constitution and Acts of Congress, have no jurisdiction over an action at law where both parties are aliens, and that it cannot obtain jurisdiction in such a case by consent of the parties, the Court said:

> "The complaint discloses on its face that it is one which a federal court is without

jurisdiction to entertain. The jurisdiction of these courts is derived from the Constitution and the Acts of Congress. No jurisdiction is conferred upon the federal courts of a case in which both the parties are aliens, (*Montalet* v. *Murray*, 4 Cranch, 46, L. Ed. 545; *Mossman* v. *Higginson*, 4 Dall. 12, 1 Law. Ed. 720; *Pooley* v. *Luco* (CC) 72 Fed. 561; *Prentiss* v. *Brennan*, Fed. Cas. No. 11,385, 2 Blatchf., 162), and this complaint shows that the plaintiff and defendant are both aliens. A court of the United States cannot obtain jurisdiction to hear and decide a case by consent of the parties. *Peoples Bank* v. *Winslow*, 192 U. S. 256, 26 L. Ed. 101; *Byers* v. *McAuley*, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867. It was the duty of the District Judge to have dismissed the complaint on its own initiative, even though the defendant did not call the matter to his attention. *Judicial Code* (Act March 3, 1911, c 241) Par. 37, 36 Stat. 1098 (Comp. St. Par. 1019), provides as follows: 'If in any suit commenced in a District, or removed from a state Court to a district court of the United States, it shall appear to the satsifaction of the District Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said District Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said District Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.' But, this was not done by the court below, it must be done by this court."

3. It will be evident from a glance at the complaint that no federal question is involved under Article III, Section 2 of the Constitution to give jurisdiction. It is merely an action for seaman's wages. But although an action for seaman's wages is within admiralty jurisdiction as on an admiralty contract, there is no ground under the reasoning in *The Carolina, supra,* for this court's retaining jurisdiction of the case at bar for it is a suit brought upon a contract made by a foreign sovereign government with an alien in its own Consulate, *i. e.*, in its own territory, and to be performed on the high seas and in its own territory under its own flag, and one to which the law of the foreign country particularly applies.

4. Even if there were ground for admiralty jurisdiction of the subject matter in this case, still this Court should not retain jurisdiction, for under the principles in the *Kaiser Wilhelm III* case, *supra,* a *Brazilian* plaintiff could not maintain a suit of this kind in the courts of this country against defendant below to enforce a claim arising under Portuguese law in what is actually Portuguese territory, where neither the law of Brazil nor that of Portugal gives the plaintiff below such a right.

5. Finally although an admiralty court might have jurisdiction of a suit of this character, this action was not brought in admirality. It is an action at law on the law side of the court and therefore as a Federal Court of law has no jurisdiction in actions between aliens, the complaint herein must be dismissed.

III.—The complaint should be dismissed because the action is brought by an alien seaman against a sovereign government on a contract made and entered into and to be executed wholly within the territory or upon the ships of that foreign sovereign government.

1. Although, as stated, this contract, being one involving the question of seaman's wages may therefore be an admiralty contract and within the admiralty jurisdiction, still no reason exists in this case for the retention of jurisdiction by this Court upon that ground. The claim is now before the Portuguese Government and will be paid in due course regardless of the decision of this Court, so that no injustice to a seaman will be prevented by the court's retention of jurisdiction.

2. The contract or shipping articles, which plaintiff below signed, as alleged in the complaint, show that the plaintiff below was an alien, a native of Brazil. The defendant below is, as shown by the suggestion of the Minister Plenipotentiary and Envoy Extraordinary of the Republic of Portugal to the United States (Record, p. 205) and by the Exhibits "A" and "B" of the defendant below (Record, pages 47, 48, 50, 51, 104 and 205) a Department of the Government of the Republic of Portugal. The contract was signed by the plaintiff below in the Consulate of the Republic of Portugal, and, therefore, in the view of the law, on Portuguese territory. It was a contract to serve the defendant below not altogether in any particular vessel, but on its ships generally as directed by

the defendant below. It was to be performed wholly within the territory of the defendant below or on its ships under its flag, and it was a contract to be construed and governed by the laws of the said Sovereign Government of Portugal (Record, pages 15-19). It was a contract which our Courts could not essay to enforce or consider without violating the cardinal principle that the courts of one independent government will not sit in judgment on the validity of the acts of another done within its own territory. In such cases, and especially whenever objection is made, as has been done in this case by the diplomatic representative of the foreign government, it is an established principle of law and comity that the courts of the United States will not entertain jurisdiction of controversies between an alien and a foreign sovereign or between alien citizens of such a foreign government. (*Wulfsohn* v. *Russian Soviet Government*, 195 N. Y. 472; *Goldman* v. *Furness Withy & Co.*, 101 Fed. 467; *The Carolina*, 14 Fed. 424; *Macon* v. *International Railway*, 83 N. E., 876, 197 Mass. 349, 16 L. R. A., (N. S.) 276; *The Adriatic*, 258 Fed. 902; *The Roseric*, 254 Fed. 154.)

(a) In *Macon* v. *International Railway*, *supra*, it was held that an action brought in a court of the State for personal injuries sustained in Canada by the operation of the Intercolonial Railway of Canada will be dismissed for want of jurisdiction where the railway is the property of the King of England and not a corporation and is operated through his government of Canada for the public purposes of Canada, since the suit was against a foreign

sovereign. In the case at bar the suit is for wages claimed to have been earned on a ship of the Portuguese Government, owned and operated by the Portuguese Government for its own sovereign uses and public purposes. It is practically the same as would be a suit by a naval officer against his government for wages for services rendered on one of its war vessels. It is a suit by an alien against a foreign sovereign.

(b) In *Goldman* v. *Furness Withy & Co., supra*, where even a court of admiralty *in the exercise of its discretion* had refused to entertain jurisdiction of a suit between foreigners for the breach of a contract of carriage made in Canada, no part of which was to be performed within the United States, and it appeared that the controversy could more properly be determined by the courts of Canada, by the laws of which the contract was governed, it was held that the court of admiralty was not required to entertain a second suit on the same cause of action by an assignee of the former libellant, who was a citizen and resident of the district where the suit was brought, when the assignment was merely colorable, and made for the purpose of enabling the suit to be brought in such court; and the court said:

> "Upon a former libel filed February 15, 1900, by Sally Wertheim, as libellant, against the present defendant, and upon a special appearance of the defendant and affidavits showing that both parties were non-resident; that the contract was in fact made between the agents of the parties in person in Mon-

> treal; that no part of the contract was to be executed within the United States; that it has been partly performed; that it was governed by the law of Canada, and that nearly, if not quite all, of the witnesses were there, and that the convenience of parties would be greatly subserved by the trial of the cause in Canada, rather than within this jurisdiction, it was held that the court should not exercise its discretionary power to enforce a trial of the cause here, but should remit the parties to the more appropriate forum of Canada. * * *
>
> Here the circumstances are all different. Every circumstance opposes the trial of the cause within this jurisdiction and makes that of Canada more appropriate, except apparently the choice of the German Company and its agent, the present libellant. This court is *overburdened with causes which must be tried within this jurisdiction;* and it ought not voluntarily to entertain jurisdiction of other causes which on all grounds are more appropriately triable elsewhere, to the neglect and prejudice of its own proper and necessary business."

These words are most aptly in point with the case at bar. This contract was wholly to be performed under the Portuguese flag. It had been partly performed. It was governed by the law of Portugal. Nearly, if not quite all of the witnesses were within the jurisdiction of a Portuguese tribunal. The convenience of the parties would therefore be considered by the trial of the cause in Portugal. The jurisdiction of Portuguese Courts would be more appropriate. Moreover this action is not one in admiralty but at *common law* and therefore this court has no discretion in a case of this kind, but not only should

decline to entertain jurisdiction for all the reasons given in the case last above cited it but should decline as a Court of common law to entertain jurisdiction in this case and remit the cause to the courts of Portugal for disposition.

(c) In *Wulfsohn* v. *The Russian Soviet Republic, supra*, it was laid down that every sovereign state is bound to respect the sovereignty of every other sovereign state, and that the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. This principle appears with force in the case at bar. If this sovereign defendant below did not pay this plaintiff below as he demanded it must have had some reason which to itself seemed good and sufficient for its refusal and the courts of the United States should not sit in judgment on this act of this sister sovereign government of the Republic of Portugal.

(d) In *The Carolina, supra*, where it was held that the admiralty courts of the United States cannot be required to allow themselves to entertain jurisdiction of a case where a subject of a foreign government invokes their action against a merchant vessel of that foreign government, the Court declining to entertain jurisdiction said:

> "This is an action brought to recover damages for assault and battery, alleged to have been committed on the high seas. * * * The British Consul resident at this port, having been notified, came before me and, in behalf

of his government, remonstrated against this court taking cognizance of the cause * * * The only ground upon which a foreigner could urge a claim to become a libellant in our courts would be that it was by comity due his government that its subjects should be thus heard, and, so far as this claim could be considered as a right, it could be insisted on only by that government, and, except in cases of inhumanity or gross injustice, would disappear whenever the claimant's government took a position against it. * * *

It is a suit brought by a foreigner springing out of a voyage on the ship of a friendly nation on account of alleged grievances. The representative of that Country asks this Court not to interfere. * * *

In this case I am satisfied, by reason and abundant authority, that the court should decline to entertain jurisdiction. *Gienar* v. *Meyer*, 2 H. Bl. 603; *The Golubchick*, 1 W. Rob. 143; *Gonzales* v. *Minor*, 2 Wall. Jr., 348; *The Becahrdass Ambaidass*, 1 Low. 569; *The Maggie Hammon*, 9 Wall. 435; *One Hundred and Ninety-four Shawls*, Abb. Adm. 317; *Gardner* v. *Thomas*, 14 Johns, 134; *Johnston* v. *Dalton*, 1 Gow. 543; and the very able articles on 'suits between aliens in the courts of the United States,' (7 *Amer. Law. Rev.* 417) from which a reference to many of the above cases was derived."

Here the suit was dismissed although the action was only *against a merchant vessel of the foreign government*, while in our case the action is against the government itself.

The right of the plaintiff below herein to bring an action of this kind in our federal courts could only be considered as a right by consent or upon request of his government. If that government

was Brazil it has made no such request by consul or otherwise. If the government of the plaintiff below was Portugal, it has objected to such jurisdiction by its Minister.

This is a suit, as in *The Carolina, supra,* brought in our courts by a foreigner springing out of a voyage on the ships of a friendly nation, on account of alleged grievances and the representative of that country has asked this court not to interfere.

3. In *The Carolina, supra,* the case last cited the Court dismissed the libel because the foreign government represented by its Consul objected to the jurisdiction of the Court. In our case at bar the Portuguese Government repeatedly insisted upon its objection and filed a suggestion by its Minister.

4. From the cases hereinbefore cited and quoted it is clear that it is contrary to the principles of comity of nations and the policy of this United States Government to permit the citizens and subjects of a foreign government to sue their own or another foreign government or another alien in the courts of the United States upon a claim or contract arising within the territory or jurisdiction of that foreign government or to be performed in the territory or within the jurisdiction of that foreign government as in the case at bar, and certainly so is it contrary to said principle and policy to permit such a suit to be brought in a court of the United States which could not be brought in the courts of the foreign government. This suit could not have been maintained by this plaintiff below in a

Portuguese Court, as there it would be known to be a suit against that government. This plaintiff below could not attach property of or sue the government of Portugal in Portugal, so it was necessary, if he were to sue at all, that the suit be brought against that government in the said District Court under the guise of the defendant below being a corporation. Under the above principles of law our courts should decline to entertain jurisdiction.

IV.—The suggestion of the Minister of Portugal also sets up the Treaty between the United States and the Republic of Portugal, of which this court can take judicial notice, and affirms that under the terms of this treaty this court should decline to exercise jurisdiction in this case. The pertinent provisions of this treaty are:

> (a) "Article II—Treaty of Commerce and Navigation; Vessels of the United States of America arriving either laden or in ballast, in the ports of the Kingdom and possessions of Portugal, and reciprocally, the Portuguese vessels arriving, either laden or in ballast, in the Ports of the United States of America, shall be treated, on their entrance, during their stay, and at their departure upon the same footing as national vessels."
>
> (b) The most favored nation clause.

Under these provisions of the Treaty a vessel owned and operated as a Portuguese government vessel should have been exempt in this action from attachment in this country. For since the United States Government would not permit one

of its own government owned ships to be arrested, under the Act of March 9th, 1920, its Courts should not permit a vessel owned by the Portuguese Government to be arrested here, and, if the principle enunciated in *The Carolina, supra*, and other above cited cases is to be followed in the case of the British and Russian governments and their vessels and property, it should also be observed and enforced in the favor of the Portuguese government and its property.

V.—This case is distinguishable from the cases, the rule of waiver in which was followed by the trial judge in the instant case of *Tietjen & Lang Dry Dock Company against the Steamship Sao Vicente in rem*, and against this defendant *in personam*, *Maxwell Rose against the Steamship Mormugao in rem*, and against this defendant *in personam*, and *Thomas de Simone against the Steamship Mormugao in rem*, and against this defendant *in personam*, recently pending in the United States Courts, in that in these cases the actions were brought by citizens of this country for alleged materials furnished and services rendered in this country under contracts alleged to have been made and to be performed in this country, while in this case now before this court the action is brought by an alien Brazilian or a Portuguese sailor against the Portuguese government as an alleged Portuguese Corporation, and therefore by an alien against a foreign sovereign based on a contract made in Portuguese territory as in its consulate, or within the jurisdiction of Portugal, and to be performed wholly within Portuguese

territory or jurisdiction, and in which, under the laws of Portugal, as shown by the suggestion herein of its minister, no suit could be brought or would be entertained in or by any Portuguese Court. If this practice were looked upon with favor by the Courts of other nations, then a sailor of this country, particularly in its merchant service operating ships of the United States Shipping Board, could go abroad and sue this United States Government in a foreign country in a claim against it on which it could not bring suit against the United States government in its own courts except by its own consent. As this action could not be maintained by this alien plaintiff in the Courts of Portugal against the government of Portugal, it follows, therefore, under the rules and principles of comity between nations that he should not be permitted to maintain it in the Courts of this Country.

VI.—For the above reasons it would seem clear, that, even if the cause were an action in admiralty and within the admiralty jurisdiction, this Court should dismiss this complaint and leave these alien parties to the jurisdiction of the Portuguese Court for the enforcement of this contract to which the laws of the Government of Portugal would apply. But the fact should not be overlooked that this is an action at law and not in admiralty, whereof the Court cannot entertain jurisdiction between aliens and much less between an alien and a sovereign.

POINT VI.

The question of jurisdiction is properly raised by a motion to dismiss at the trial.

1. The question of lack of jurisdiction is usually raised by a motion to dismiss as in this case. (*Metropolitan S. S. Co.* v. *Pacific-Alaska Navigation Co.*, 260 Fed. 973). This motion was made by the defendant below and it should have been granted.

2. It can be raised at any time as shown in Point II, *supra*.

3. The motion cannot be defeated by any claim of consent of the parties, for, if brought to the attention of the Court at any time that jurisdiction is lacking, or upon its own initiative, the Court should dismiss the action. Therefore the objection cannot in any manner be waived or considered by consent of the parties. *The Oceana*, 148 Fed. 131, 132. *Cunard S. S. Co.* v. *Smith*, 255 Fed. 846. In *The Oceana*, *supra*, the Court said:

> "The libellant rejoins that the claimant by appearing, filing claim, executing the usual stipulation for value, and admitting the jurisdictional averments of the libel, has waived whatever advantage these defenses might have conferred if duly pleaded. Consent, however, cannot give jurisdiction if it does not exist as to the subject matter of the suit; if the contract sued on be not maritime, jurisdiction of the subject matter is lacking; while if there be no maritime lien there is no foundation for a decree *in rem*. *The Monte A* (D. C.) 12 Fed. 333. The

claimant's methods of presenting these jurisdictional points is certainly unusual, but sufficient to require their consideration. *The John C. Sweeney* (D. C.) 55 Fed. 540."

In our case the jurisdictional averments in the complaint were not admitted but on the contrary the defense of lack of jurisdiction and objection to the jurisdiction of the Court was formally pleaded in the answer.

POINT VII.

The Complaint Herein Should Be Dismissed.

Dated, New York City, February 14, 1924.

Respectfully submitted,

F. Dudley Kohler,
Attorney for Defendant,
Office & Post Office Address,
25 Broadway,
Borough of Manhattan,
New York City.

ANNEX "A."

(Recorded 200 N. Y. App. Div. 82)

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

February, 1922.

Present:—Hon. JOHN PROCTOR CLARKE, *P. J.*,
" FRANK C. LAUGHLIN,
" VICTOR J. DOWLING,
" ALFRED R. PAGE,
" EDGAR S. K. MERRELL, *JJ.*

THOMAS DE SIMONE,
Respondent,

vs.

TRANSPORTES MARITIMOS DO ESTADO,
Appellant.

Motion No. 58, February 10, 1922.

Motion for a re-argument of the appeal decided January 13, 1922 (199 App. Div. 602), or in the alternative for leave to appeal to the Court of Appeals.

APPEARANCES:

MEYER KRAUSHAAR, of Counsel (Celler & Kraushaar, Attorneys), for the motion.

F. DUDLEY KOHLER, opposed.

PAGE, *J.*:

The inspiring cause of this motion is the fact that the United States Circuit Court of Appeals for the Second Circuit, in a suit in admiralty, wherein the vessels libelled were in the possession and control of the above-named defendant, had dismissed the appeal and stated that "The sovereign immunity can be waived in this case." Thereafter our decision was called to the attention of that Court, with the suggestion that our decision was not in harmony with theirs, whereupon the Circuit Court handed down an opinion more fully stating their views, and their opinion is, among other things, suggested as grounds for a re-argument of this appeal. Our great respect for the learning and ability of the United States Circuit Court of Appeals for the Circuit of which this State is a part, has caused us to give careful consideration to their opinion, especially to the reasons assigned in the final statement denominated "3." The remaining part of the opinion dealing with the facts as related to admiralty procedure have no bearing upon a decision in an action at law in a court of the State of New York.

In our former opinion we held that the defendant by serving an answer denying certain material allegations of the complaint and pleading certain separate defense, among which was a plea to the jurisdiction on the ground that the defendant was a department of the government of Portugal, an independent sovereign nation in amity with the United States Government, did not thereby waive the objection to the jurisdiction. The substance of the defense was thus stated in

our opinion: "The defendant objects to and protests against the assumption of jurisdiction by this Court, and alleges that it is a department of the sovereign government of Portugal and cannot be sued in any of the courts of the United States without its consent, and that this action is in substance and effect an action against the Government of Portugal, and as such is not maintainable against the defendant." To this defense a demurrer was interposed for insufficiency. We treated this answer as the equivalent of a voluntary general appearance and stated: "A voluntary general appearance of the defendant is equivalent to the personal service of the summons within the state (Code Civil Procedure §424) and therefore waives the objection of jurisdiction of the court in such cases as those in which the court would acquire jurisdiction of the person if such service was made within the states." We pointed out that it was impossible to obtain jurisdiction by the service of a summons upon any officer or representative of the Government of Portugal that might have been within this State.

The Circuit Court of Appeals, on the contrary, said:

> "3. Finally, if we were to pass by the questions already considered, appellant is confronted with a line of cases of ruling authority which have now clearly held that the immunity of the sovereign being susceptible of waiver is lost when the sovereign enters a litigation with a general appearance."

The cases relied on by the Court as establishing this principle are *Clark* v. *Barnard* (108 U.

S., 436, 447); *Gunther* v. *Atlantic Coast Line R. R. Co.* (200 U. S., 284, 289); *Porto Rico* v. *Ramos* (232 U. S., 627); *Richardson* v. *Fajardo Sugar Co.* (241 U. S., 44); *Veita et al* v. *Fortuna Estates* (240 Fed. R., 256, 262). In every one of these cases the question arose as to the effect of a voluntary appearance in an action in the United States Courts of either one of the states of the United States or of Porto Rico, a territory of the United States. (See *Kopel v. Brigham*, 211 U. S., 468, 476.)

A state of the Union is not an independent sovereignty, either in relation to foreign nations or to the other states of the United States. The Federal government is the sole sovereignty recognized by other governments. A state has no position in international matters except as represented by the Federal government. As between themselves the states are separate entities, but they have no power to make treaties or compacts with each other, except as authorized by the Congress of the United States. Claims cannot be enforced or wrongs redressed by levying war, but an action may be maintained against the offending state in the Supreme Court of the United States (*N. H.* v. *Louisiana*, and *N. Y.* v. *Louisiana*, 108 U. S., 76, 90). A state has been designated by Mr. Justice Holmes as a "quasi sovereign" and by Mr. Justice Harlan as "possessing some powers of sovereignty." *Georgia* v. *Tennessee Copper Co.*, 206 U. S., 230, 237, 239.)

Within its territorial limits, a state may take and enforce laws; set up courts and define their jurisdiction; maintain a militia; exercise the police powers and rights of eminent domain; levy

and collect taxes; create municipal and private corporations; and exercise generally sovereign powers. Its sovereignty ends with its state boundary lines. Its relations with other states of the Union are not governed or controlled by international law or comity, but by a private international law, usually denominated a conflict of laws, regulated and controlled by the constitution and laws of the United States. This distinction is evident when we consider that a citizen of a state cannot sue that state in any court without its consent, because as to the citizen the state is a sovereign, but until the adoption of the eleventh amendment to the Constitution of the United States a citizen of another state could sue a state in the United States Courts (*Chisholm* v. *Georgia*, 2 Dallas, 419, 471-2) and as demonstrated by Chief Justice Jay, there was nothing derogatory to the dignity of a state in subjecting it to suit in a court of the United States.

It has been the practice of states either to erect special courts in which one of its citizens could prosecute claims against the state, or to confer jurisdiction on courts to hear and adjudicate such claims. Therefore its consent to waive the constitutional immunity from suit could be implied from its act by appearance as well as by express legislative provision.

In my opinion the right of a court of this country to assume jurisdiction over a cause of action against a foreign sovereign nation, or to seize and impound its property cannot be reasoned from analogy to the right to so treat another state. In *New Hampshire* v. *Louisiana*, and *New York* v. *Louisiana* (*supra*) it was distinctly

held that one state cannot create a controversy with another state by assuming the prosecution of debts owing by the other state to its citizens. In *United States* v. *Dickelman* (92 U. S., 520, 524) the Court said: "One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in the performance of his obligations, by treaty or otherwise voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself." Alexander Hamilton wrote "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without his consent. This is the general sense, and the general practice of all mankind" (The Federalist No. LXXXI.) The leading case in this country on the immunity of a vessel of a foreign sovereignty from seizure by the courts of the United States in a suit in ad-

mirality is *The Exchange* (7 Cranch, 116), in which the schooner *Exchange*, owned by American citizens was seized on the high seas by a French privateer, taken to France and refitted as a vessel of war. Two years after she entered an American port, and upon libel filed in the United States District Court, by her former owners, was seized by process of the court. The libel was dismissed by the District Court, the sentence of the District Court reversed by the Circuit Court and on appeal the sentence of the Circuit Court reversed and that of the District Court affirmed by the Supreme Court of the United States. Mr. Justice Marshall writing for the Court held that a public armed vessel of a foreign nation entering the port of a friendly state under the circumstances of that case is not subject to the judicial tribunals of the United States. The same principle was applied by the Court of Appeals Division of the High Court of Justice of England in the case of the Parlement Belge (L. R., 5 Prob. Div., 197 in 1880) in proceedings in rem to secure redress for loss incurred by a collision instituted against an unarmed mail packet boat belonging to the Government of Belgium, officered and commissioned by that Government and sailing between Dover and Ostend. The court held that the vessel came within the rule which extends immunity from the jurisdiction of the courts of one country to the public vessels of a foreign nation, even though incidentally carrying freight and passengers for hire. The court cited and quoted from the following cases: *The Exchange* (*supra*) *The Duke of Brunswick* v. *The King of Hanover* (6 Beav., 1,

50); *The Prins Frederick* (2 Dod., 451, 456); *De Haber* v. *The Queen of Portugal* (17 Q. B., 171); *The Athel* (1 Wm. Rob., 374); *Briggs* v. *The Lightships* (11 Allen [Mass.] 157); *The Marquis of Huntley* (3 Hagg., 246); *The Thomas A. Scott* (10 L. J., [N. S.] 726) and *Vavasseur* v. *Krupp* (L. R., 9 Ch. D., 351). The court then said: "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction." The court then considered the argument that the admiralty suit was a proceeding *in rem* solely against the property, and not a procedure directly or indirectly impleading the owner of the property, and held that a court which seizes and sells a man's property assumes to make that man subject to its jurisdiction and said (page 219): "To implead an independent sovereign in such a way is to call upon him to sacrifice either his property or his independence. To place him in that position is a breach of the principle upon which his immunity from jurisdiction rests. We

think that he cannot be indirectly impleaded, any more than he could be directly impleaded. The case is, upon this consideration of it, brought within the general rule that a sovereign authority cannot be personally impleaded in any court." These decisions so far as I have been able to discover have never been questioned.

Is this immunity from suit lost by appearing generally and protesting or setting up the plea of immunity by answer? As we stated in our former opinion, a voluntary general appearance of the defendant is equivalent to the personal service of the summons within the state (Code Civ. Pro. §424) and therefore waives the objection to the jurisdiction of the Court in cases in which the court would acquire jurisdiction of the person if such service was made within the state. It follows from this that where the person served is immune from suit in our courts so that by personal service of the summons no jurisdiction could be obtained, his service of an answer in which he protests against the assumption of jurisdiction, and pleads the want of jurisdiction as a defense, does not thereby waive the defense. For the plea goes not alone to jurisdiction of the person but to the subject matter of the action as well, although the action is to recover for goods sold and delivered, of which the Court would have jurisdiction ordinarily. It is more than this, it is to recover for goods sold and delivered to a foreign sovereignty of which the court does not, and cannot have jurisdiction except with its consent. In the case of *The Parlement Belge* (*supra*), (page 220) the Court said: "It has been frequently stated that an independent sovereign

cannot be personally sued, although he carried on a private trading adventure. It has been held that an ambassador cannot be personally sued, although he has traded, and in both cases because such suit would be inconsistent with the independence and equality of the state which he represents." In one sense the defendant by pleading has submitted the question as an issue of fact to the court, and that is whether the defendant above named is a department of the government of Portugal. We did not discuss this in our former opinion, for there we were dealing with the demurrer to the defense which we overruled, thereby holding that the facts alleged, taken as true, would constitute a defense. We did not direct a dismissal of the complaint, but left the issue of fact to be tried. The plaintiff claims that he is thus put at a disadvantage, as he will have to fully develop his case before the defendant is required to put in its defense. This result does not follow. The Court at Special Term would, undoubtedly, grant an order directing the issue of jurisdiction to be separately tried, as that issue if resolved in favor of the defendant would lead to a dismissal of the action, and if decided that the defendant was not a department of the government but a corporation similar to that considered by us in *Ingersoll-Rand Co. v. U. S. Shipping Board Emergency Fleet Corporation* (195 App. Div., 838) then the action would be tried on its merits.

In *Ex parte Muir* (254 U. S., 522, 532) the Court indicated the different methods in which a foreign sovereignty could raise the question of jurisdiction. We stated in our former opinion

the methods therein set forth, among which was by appearing in the action, or presenting its claim through the State Department of the United States Government and, if it sanctioned the claim of immunity, presenting it to the court through the Attorney General. In the *Pesaro* case (255 U. S., 216) instead of following the methods prescribed in *Ex parte Muir* the Italian Ambassador suggested to the court that the ship was owned by the Italian Government and at the time of the arrest was in its possession. The libellant objected that a direct suggestion by the Ambassador was admissible and that to be entertained, the suggestion should come through the official channels of the United States. This objection was overruled and the ship released from arrest.

The Supreme Court in reversing the decree said (page 219): "The terms and form of the suggestion show that the ambassador did not intend thereby to put himself or the Italian Government in the attitude of a suitor, but only to present a respectful suggestion and invite the court to give effect to it. He called it a 'suggestion' and we think it was nothing more. In these circumstances the libellants' objection that, to be entertained, the suggestion should come through official channels of the United States was well taken, (*Ex parte Muir*, 254 U. S. 522"); and further stated that an opportunity must be given so to present and establish the matters affirmed in the suggestion in an appropriate way when the case goes back to the District Court.

In the instant case the above named defendant by its attorney answered, setting up the defense

that it was a department of the Government of Portugal. Can it be said that the defendant had consented to the jurisdiction of the court when the answer presented a protest and a defense to the jurisdiction? As the Court said in *United States* v. *Dickelman* (*supra*): "It rests with the sovereign against whom the demand is made to determine what he will do with it." In the instant case a defense to the jurisdiction of the court and a protest against its exercise was submitted to the court.

If that should prove to be the fact the court has no jurisdiction and could not disregard the protest and overrule the objection by a claim that by the municipal law of this State the defense was waived, for by the law of nations an adjudication binding the sovereign to pay the judgment could not be made nor its property taken on execution to satisfy the judgment. To hold otherwise would allow the courts of this State to endanger the peaceful relations between the United States and a friendly sovereignty and furnish the latter with a *casus belli*.

In our former opinion we cited the case of *Smith* v. *Tuttle* (14 N. Y., 465), merely for the purpose of showing the distinction between pleas in common law pleading and answers and defenses under the code pleading; that under the former pleas in abatement and in bar could not be joined, while under the latter a defendant answers but once and he may set forth as many defenses as he thinks he has, and therefore a union of defenses in an answer did not necessarily cause the abandonment of any of them. As an illustration and in harmony with this prin-

ciple we cited *Hamburger* v. *Baker* (35 Hun, 455, 457). This case was not overruled in *Reed* v. *Chilsom* (16 N. Y. Supp., 744, aff'd, 142 N. Y., 152), in which the non-resident defendant whose property had not been attached appeared by attorney who served a general notice of appearance, and some three months afterwards answers were served setting up several defenses and among them the lack of jurisdiction. In the *Hamburger* case and in the case at bar there was no notice of appearance served, but the appearance was effected by the service of an answer. A notice of appearance may be limited for the purpose of raising the question of the jurisdiction of the court and where the appearance is by demurrer or answer which raises the question of jurisdiction of the court the defendant cannot be held to waive the objection or defense expressly stated in the pleading. §488 of the Code of Civil Procedure expressly provides that "the defendant may demur to the complaint, where one or more of the following objections appear upon the face of the complaint. 1. That the Court has not jurisdiction of the person of the defendant. 2. That the Court has not jurisdiction of the subject of the action" * * * and (§498) where any matter enumerated in §488 as grounds for demurrer do not appear on the face of the complaint the objection may be taken by answer. If not taken either by demurrer or answer the defendant is deemed to have waived it except the objection to the jurisdiction of the Court. * * * (§499). If the objection in the first instance is presented in the manner prescribed by the Code, how can the defendant be deemed to

have waived it? The answer would seem to be that it has not. (*Popfinger* v. *Yutte*, 102 N. Y., 38, 42; *Hankinson* v. *Page*, 19 Abb. N. C., 274 276; Wallace, *J.*, U. S. Dist. Co., So. Dist., N. Y.; *Weidman* v. *Libby*, 16 App Div., 616, 622.)

In the instant case if the facts stated in the defense are proved then no court in the State of New York has acquired or can acquire jurisdiction of the person or the subject matter of the action over the protest of the defendant. We therefore adhere to our original decision, and the order will be modified as directed in our former opinion.

As the order does not finally determine the action, leave to appeal to the Court of Appeals is denied with $10 costs.

All Concur.

34957.

No